No. 12046

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D. SALLEE,

Appellees.

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

APPELLEES' BRIEF IN REPLY TO THE BRIEF OF THE UNITED STATES.

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Appellees.

APPELLEES' BRIEF IN REPLY TO THE BRIEF OF THE UNITED STATES.

Opinions Below.

The District Judge presiding at the hearing of the petition for allowance of attorneys' fees and expenses of suit did not write an opinion; but said Judge orally stated his opinion which appears at pages 59-66 of the record.

The opinion of the District Court at the trial of this cause upon the merits appears in 60 Fed. Supp. at pages 411-428, and is important in the consideration of appellees' right to attorneys' fees and expenses of suit.

Jurisdiction.

The District Court had equitable jurisdiction under the Act of August 15, 1894, as amended, 25 U. S. C. A. Section 345, to determine the right of Lee Arenas to trust patents covering the lands selected for allotment by him and his deceased wife Guadaloupe Arenas, and to adjudge and decree his said right with the same effect as if such trust patents had been issued by the Secretary of the Interior.

The equitable jurisdiction of the District Court under Title 25 U. S. C. A., Section 345, extends to the allowance of attorneys' fees and expenses of suit to the attorneys of record for Lee Arenas.

This court has jurisdiction upon appeal under Title 28 U. S. C. A., Section 225(a).

Statutes Involved.

The Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345, which is quoted at pages 2-3 of the Brief of the United States, and portions of the Mission Indian Act (Act of January 12, 1891, 26 Stat. 712) and of the General Allotment Act (Act of February 8, 1887, 24 Stat. 388, as amended) are involved. Certain applicable portions of said Acts are set forth in the Appendix to Appellants' Brief, pages 32-34, and need not be recopied here.

Questions Presented.

The Government's brief presents only two questions of law for decision on this appeal, namely:

1. Did the District Court have jurisdiction to impress a lien upon the lands decreed in this suit to be allotted to Lee Arenas, or to enforce such lien by appointing a receiver or by ordering a sale of the property?

2. Did the District Court have jurisdiction to hear and determine appellees' supplemental petition for the allowance of attorneys' fees and expenses of suit under 25 U. S. C. A., Section 345?

We think these questions should be argued in inverse order.

3. We think there is the additional question: If the District Court had equity jurisdiction under 25 U. S. C. A., Section 345, to adjudge and decree the equitable right of Lee Arenas to a trust patent to the lands selected by him and his wife Gudaloupe for allotment, did not such equity jurisdiction necessarily extend to the allowance of attorneys' fees and expenses of suit and the payment thereof out of the lands recovered for Arenas by said attorneys?

Statement.

Appellees concur to a limited extent in the "Statement" in the Government's Brief (pp. 4-10). This concurrence applies, however, only to the *facts* therein stated. Appellees totally disagree with the conclusions drawn therefrom. Such additional facts as may be necessary to a proper consideration of this appeal will be stated under the several points of the argument, *infra*.

The suit out of which this fee proceeding arose was made necessary by the wilful failure and refusal of the United States, as trustee for Lee Arenas, Guadaloupe Arenas, and other members of the Palm Springs Band of the Mission Indians of California, to approve their selections of lands for allotment and to issue trust patents therefor to the several Indians entitled thereto. The position of the United States in this suit is that of a trustee who has violated its trust. For more than thirty years, it has opposed all efforts of the members of the Palm Springs Band of Mission Indians to secure allotments of land in severalty, and trust patents therefor. Moreover, this opposition has been maintained contrary to the Congressional Mandate directing it to make such allotments. (Act of March 2, 1917, 39 Stat. 969-972.) The United States has thus failed and refused to discharge its fiduciary duty to these Indians, and has thereby compelled them to employ counsel and seek equitable relief in the District Court. With equal pertinacity and injustice, it now actively opposes the allowance of attorneys' fees and expenses of suit made

necessary by its own neglect and refusal to perform its duty as such fiduciary.

The position of the Government in respect to the claims of the Palm Springs Band of Mission Indians for allotments in severalty and trust patents thereto, and its present position in respect to attorneys' fees and expenses of suit, are contrary to every concept and principle of equity and justice, and are entitled to scant consideration.

It is significant that in its brief the Government dwells at great length upon technicalities of law, but ignores the equities underlying appellees' right to fees and expenses made necessary by its breach of fiduciary duty.

Summary of Argument.

The United States has consented to be sued in this action. (Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345.)

The jurisdiction of the District Court under 25 U. S. C. A., Section 345, is equitable.

In the exercise of its equity jurisdiction the District Court has power to allow attorneys fees and expenses of suit.

As an incident to the exercise of its equity jurisdiction the District Court may impress a lien upon the property recovered to secure the payment of attorneys' fees and expenses of suit. It may also order a sale of such property, or so much thereof as may be necessary, to satisfy the lien fixed by its decree.

ARGUMENT.

I.

The District Court Has Jurisdiction and Power to Allow Attorney's Fees and Expenses of Suit in This Equitable Action.

The Act of August 15, 1894, as amended (25 U. S. C. A., Section 345) evidences the consent of the United States to be sued by any person of Indian blood or descent who claims to be entitled to an allotment of land in severalty. Said Act expressly confers jurisdiction upon the District Courts "to try and determine any action, suit, or proceeding . . . involving the right of any person, in whole or in part of Indian blood or descent, to any allotment . . ." and the decree of such Court in favor of a claimant shall operate as an approved allotment.

(A) Jurisdiction Conferred by 25 U. S. C. A., Sec. 345, Is Equitable.

The jurisdiction conferred upon the District Court by Title 25, U. S. C. A., Sec. 345, is essentially equitable. It could not be otherwise, since manifestly the suit authorized is that of the beneficiary of a trust against the trustee thereof.

The Federal Courts have uniformly held that such a suit is of equitable nature.

Halbert v. United States, 283 U. S. 753;
Hy-Yu-Tse-Mie-Kin v. Smith, 194 U. S. 401;
Gerard v. United States, 167 F. 2d 951;
United States v. Hillard, 322 U. S. 363, 368;
Arenas v. United States, 60 Fed. Supp. 411, 419;
United States v. Arenas, 158 F. 2d 730, 746-747;
Pape v. United States, 10 F. 2d 219.

In these and numerous other cases the Courts have indicated, by the use of the word "suit," and in numerous other ways that an action for an allotment under Section 345 of Title 25, U. S. C. A., is equitable.

In *Pape v. United States,* 10 F. 2d 219, *supra,* this court said, in the opening paragraph of the opinion:

> "*This is a suit in equity,* brought by Elsie Wilson Pape, guardian *ad litem,* under the Act of August 15, 1894 (28 Stat. 305, as amended, 31 Stat. 760 (Comp. St. Sec. 421)), to secure allotments of Indian lands for her children." (Italics ours.)

In the case at bar the learned trial judge who heard the case on its merits said (*Arenas v. United States,* 60 Fed. Supp. 411, at page 419):

> "It must be borne in mind that this is an equitable suit bringing into play equitable doctrines, and that the Government is dealing with Indians under a guardian and ward relationship. (Citing cases.) For upwards of a hundred years the United States Supreme Court has unequivocally, and many times with vehemence, set forth the positive duty of the United States toward its Indian wards. (Citing cases.)"

This Court affirmed the decree of the District Court in so far as the principle stated is concerned. (*United States v. Arenas,* 158 F. 2d 730.)

(B) Federal Courts in Equity Suits Have Power to Allow Attorneys' Fees and Expenses of Suit as Between Attorney and Client.

It is well settled that Federal Courts in equity suits have power to allow counsel fees and expenses of suit in appropriate situations, since that is a part of the historic equity jurisdiction of such Courts. (*Sprague v. Ticonic National Bank,* 307 U. S. 161, 59 S. Ct. 777, and cases cited in notes 1 and 2 at page 779.)

The rule is stated in the *Sprague Ticonic* case, *supra,* at page 779 (59 S. Ct.) as follows:

> "Obviously, both courts disposed of the petition not as a considered disallowance of attorney's fees and litigation expenses in the circumstances of the particular suit but because they deemed award of such costs beyond the power of the District Court. . . .
>
> "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. The 'suits in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act, 1 Stat. 73, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery (citing cases) subject, of course, to modifications by Congress, *e. g.,* Michaelson v. United States, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451. The sources bearing on eighteenth-century English practice—reports and manuals—uniformly support the power not only to give a fixed allowance for the various steps in a suit, what are known as costs 'between party and party', but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs 'as between solicitor and client'."

The entire opinion is valuable as showing the power of the Federal Courts in equity suits to allow attorneys' fees and expenses of suit not only as between solicitor and client but also as between party and party. The *Ticonic* case involved the right of a party, who did not sue as one representing a class, to hold others benefited by the litigation liable for attorneys' fees and expenses of suit.

The power of the Federal Courts to allow attorneys' fees and costs "as between solicitor and client" has never been in doubt since the decision of the Supreme Court in *Trustees v. Greenough,* 105 U. S. 527, 26 L. Ed. 1157. In that case Mr. Justice Bradley, speaking for the Court, one Justice dissenting, reviewed the English and American decisions and texts and held, broadly, (1) that it is a general principle that a trust estate must bear the necessary expenses of its administration, and (2) that one jointly interested with others in a common fund who maintains an action to save it from waste or destruction may have contribution from such others of proportional shares of attorneys' fees and expenses. A much simpler and stronger case is presented where, as here, it is a matter solely between solicitor and client.

The reasons underlying the rule invoked are thus stated in *Louisville, E. & St. R. R. Co. v. Wilson,* 138 U. S. 507, 11 S. Ct. 405, 407, 34 L. Ed. 1023:

> "We think it may fairly be held that a party who takes the benefit of such a service ought to pay for it, and that equity may properly decree payment therefor. As justly remarked by Lord Kenyon in Read v. Dupper, 6 Term R. 361, 'the principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these

fruits were obtained.' In Renick v. Ludington, 16 W. Va. 378, 392, it is said: 'The lien (even in cases of *quantum meruit*) is in the nature of an equitable lien (Vanleer v. Vanleer, 3 Coop. (Tenn.) page 23), and is based on the natural equity that the plaintiff ought not to be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment. See, also, Mahone v. Southern Tel. Co. (C. C.) 33 F. 702, and in re Paschal, 10 Wall. 483 (19 L. Ed. 992)."

The equitable principles stated in the foregoing decisions are ignored in the Government's brief, although they form a necessary part of the law applicable to this proceeding.

It should not be forgotten that Lee Arenas is bound by his contract, since he is *sui juris*. He is competent to contract in his own right. This was admitted in the Government's brief filed in this Court upon its appeal from the judgment on the merits, in the following language:

"Indians may make contracts in the same way as other people except where prohibited by statute. Posthook v. Lee, 46 Okla. 477, 149 Pac. 155, 156 (1915). In re Stinger's Estate, 61 Mont. 173, 201 Pac. 693 (1921). There is no statute which bars Lee Arenas from contracting with his attorneys in this case so long as the contract does not undertake to alienate or burden restricted property. The fact that Lee Arenas is a citizen exempts him from the scope of R. S. 2103, 25 U. S. C. A. Sec. 81. Plaintiff (Arenas) may pay court costs, attorneys' fees, and other expenses just

as he pays the expenses of his daily living. A judgment may be obtained against an Indian for breach of a contract even though unenforceable because his property is restricted. Stacy v. LaBelle, 99 Wis. 520, 75 N. W. 60 (1898). An Indian has the same right as any one else to be represented by counsel of his own selection. Cf. Roberts v. Anderson, 66 F. 2d 874 (C. C. A. 10, 1933)."

So, here we have a case where an Indian competent to contract has agreed with his attorneys to pay attorneys' fees and necessary expenses of litigation; the litigation is successful; and the Indian receives his allotments and the equivalent of trust patents to property valued at from one-quarter of a mililon dollars to more than one million dollars, although the Government has opposed him with all its legal resources at every step of the litigation. Now, the Government says a Court of equity must deny to these attorneys any fees and expenses of suit for services directly responsible for securing rights in valuable property long denied to him by the Government, because, forsooth, it claims the Court cannot exercise its historic equity power to allow attorneys' fees and expenses of litigation. If such a claim were advanced by an individual, instead of by the Sovereign, it would be denounced as shocking to the conscience of the chancellor. In our opinion, it is not less shocking because urged by the Government. Moreover, it is not the law of this case.

(C) District Courts in Equity Suits Have Power to Allow Attorneys' Fees and Expenses of Suit and to Require Payment Thereof Out of the Restricted Lands of an Indian Under the Circumstances of This Case.

The equitable rule announced in the *Ticonic* case, *supra,* and in *Trustees c. Greenough, supra,* has been held to apply as between Indians and their attorneys. It has also been held to apply to incompetent Indians, and to restricted property of Indians.

> *United States v. Equitable Trust Co.,* 283 U. S. 738, 51 S. Ct. 639, 75 L. Ed. 1379;
>
> *United States v. Anglin & Stevenson,* 145 F. 2d 622;
>
> *Anglin & Stevenson v. United States,* 160 F. 2d 670.

The rule was also recognized by two learned trial Judges in the case at bar.

> *Arenas v. United States,* 60 Fed. Supp. 411;
>
> (*Id.*) Judgment, R. p. 53; Opinion (oral), R. pp. 59-66.

The District Judge, in this proceeding, stated his views, R. p. 66, as follows:

> "In other words, it is my view that the Court, having jurisdiction under 25 U. S. C. Sec. 345 to render the relief in the main action, has jurisdiction to affect the land, and that the United States has consented to the exercise of full equitable jurisdiction in this action."

We think this view is amply supported by both reason and authority.

In *United States v. Equitable Trust Co.*, 283 U. S. 738, *supra,* the Supreme Court held that the restricted property of Jackson Barnett, an incompetent Creek Indian, was subject to the payment of attorneys' fees and expenses of suit. The restricted property consisted of Liberty Bonds of the value of $1,100,000.00, which Barnett had given away, with the consent of the Secretary of the Interior, to his wife and to the American Baptist Home Mission Society. About one year after the gifts were made and approved, the Oklahoma guardian of Barnett, having received information as to the gifts, "invoked the assistance of able counsel" who thereafter "brought the facts to the attention of the Secretary of the Interior, and earnestly and repeatedly requested that officer to take steps to secure a restoration of the bonds to the trust fund," but the "Secretary declined to take such action, insisted the distribution was valid and must stand, and refused to permit any moneys under his control and belonging to Barnett to be used in an effort to recover the bonds." (283 U. S. 741.)

In this situation, obviously analogous to the situation of Arenas in the case at bar, the Oklahoma guardian, as next friend of Barnett, secured Counsel who brought a suit in equity in the District Court for the Southern District of New York. About one year after the suit was filed the Attorney General sought and obtained leave for the United States to intervene in the suit "and thereby participate in the effort to effect a recovery of the bonds and their income for Barnett's benefit." (*Id.* p. 742.) Thereafter, both the Attorney General and the attorney for the next friend "harmoniously prosecuted the action to a successful conclusion" (*Id.*), but the major burden of the litigation fell upon the attorneys for the next friend. (*Id.*) A decree was entered for the restoration of the

bonds to the Secretary of the Interior, but a reservation was made therein, as here, for later taking up the matter of allowance of attorneys' fees and expenses of suit. (*Id.* p. 743.)

Upon the filing of the application for allowance of attorneys' fees and expenses of suit by the next friend, the United States, as here, actively opposed any such allowance. The District Court allowed the next friend $7,-500.00 for his services and his attorneys $184,881.08 for their services and $4,282.93 for their expenses, and ordered that these sums be paid out of the bonds recovered in the suit. The Government appealed and the Circuit Court of Appeals affirmed the decree, but reduced the attorneys' fee to $100,000.00. The Supreme Court granted certiorari upon the application of the United States, and affirmed the judgment, but further reduced the attorneys' fee to $50,000.00.

The United States insisted that the bonds, or "fund," were "restricted" property, hence "not subject to disposal in any form or for any purpose, save with the approval of the Secretary of the Interior," and argued "that the Court by charging the fund with the costs and expenses and requiring their payment therefrom would be disposing of a part of the fund in violation of applicable restrictions." (*Id.* p. 744.) The same argument is made in the case at bar.

But, the Supreme Court thought the argument was unsound, brushed it aside, and decided the question of fees in accordance with principles of equity. The Court said (*Id.* pp. 744-746):

> "It is a general rule in courts of equity that a trust fund which has been recovered or preserved through

their intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf; and this rule is deemed specially applicable where the fund belongs to an infant or incompetent who is represented in the litigation by a next friend. 'Such a rule of practice,' it has been said, 'is absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law—indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress.'

"Counsel for the United States concede the general rule, but regard it as inapplicable here. They assume that Barnett's fund was restricted in the sense that it was not subject to disposal in any form or for any purpose, save with the approval of the Secretary of the Interior; and from this they argue that the court by charging the fund with the costs and expenses and requiring their payment therefrom would be disposing of a part of the fund in violation of applicable restrictions.

"We make the assumption that the restrictions had substantially the same application to the fund that they had to the land from which it was derived, but we think the argument carries them beyond their purpose and the fair import of their words. Without doubt they were intended to be comprehensive and to afford effective protection to the Indian allottees, but we find no ground for thinking they were intended to restrain courts of equity when dealing with situations like that disclosed in this litigation from applying the rules which experience had shown to be essential to the adequate protection of a wronged *cestui que* trust such as Barnett was shown to be.

"The refusal of the Secretary of the Interior and the failure of the Department of Justice to take any

> steps to correct the wrong amply justified the institution, in 1925, of the suit in the name of Barnett by the next friend. The United States intervened only after the suit had proceeded for a full year. Its purpose in intervening, as shown by the record, was not to supplant or exclude the next friend and his attorneys, but to aid in establishing and protecting Barnett's interest in the fund in question. In its petition of intervention it prayed that this fund, 'after deducting the reasonable expenses of this litigation,' be restored to the custody of the Secretary of the Interior. Later on it acquiesced in an order allowing the next friend's attorneys $3,000 from the fund to meet expenses about to be incurred. In all the proceedings which followed the intervention it co-operated with the next friend to the single and that the diverted fund be recovered for Barnett's benefit. And both were satisfied with the main decree when it was rendered.
>
> "When all is considered, we are brought to the conclusion that the United States by its intervention and participation in the suit consented, impliedly at least, that reasonable allowances be made from the fund, under the rule before stated, for the services and expenses of the next friend and his attorneys."

The principles stated by the Supreme Court in the *Equitable Trust* case, *supra,* need no elaboration here. The analogy between the situations in that case and here is too plain to escape the attention of this Court.

In the *Equitable Trust* case the consent of the United States necessary for allowance of fees and expenses was *implied; here consent is expressly given by statute.* (25 U. S. C. A., Sec. 345.) Hence, here, as there, such fees and expenses can be paid out of restricted property with-

out the consent or approval of the Secretary of the Interior for reasons that are identical in each case.

The decisions of the Circuit Court of Appeals for the Tenth Circuit in *United States v. Anglin & Stevenson,* 145 F. 2d 622, and in *Anglin & Stevenson v. United States,* 160 F. 2d 670, fully support the proposition that, under circumstances such as are involved in the case at bar, the restricted property of an Indian may be held subject to allowance and payment of attorneys' fees and expenses of suit. Each of these cases involved the estate of Jackson Barnett, the same Indian involved in the *Equitable Trust* case, *supra.*

Following the death of Jackson Barnett, many Indians claimed to be his heirs, and numerous suits were filed, both in state and federal courts, to determine heirship. The District Court for the Eastern District of Oklahoma assumed exclusive jurisdiction in the several cases (*United States v. Anglin & Stevenson,* 145 F. 2d 622) and held that three certain groups of Indians were Barnett's heirs. The United States had previously intervened and filed appropriate pleadings in the case. The trial court held that by so doing the United States "consented to the court's jurisdiction over the Estate, which was the subject matter of the litigation, for the purpose not only of determining heirship and distributing the Estate, but also to allow a reasonable attorneys' fee and expenses to the attorneys who recovered the funds for those found to be lawfully entitled to the estate." (145 F. 2d 624.) Thereafter Anglin & Stevenson and other attorneys representing the successful heirs filed their application for allowance of attorneys' fees and expenses, and the trial court awarded them 25% of the value of the estate, all of which was held by the Secretary of the Interior in trust for Jackson

Barnett. The United States opposed, as here, allowance of any fees and expenses, and following judgment appealed to the Circuit Court of Appeals. The Court said, at page 624 (145 F. 2d):

> "The allowance of the fees to be paid out of the inherited funds recovered as the distributive shares of the Indian clients, is based upon the rule that where an attorney recovers a fund for the benefit of his client and others, those benefited thereby become obligated to pay the cost of the recovery and preservation of the fund, including a reasonable 'between solicitor and client fee.' The rule springs directly from the 'authority of the chancellor to do equity in a particular situation,' Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 59 S. Ct. 777, 780, 83 L. Ed. 1184, and has been applied under variant circumstances wherever right and justice require it. Sprague v. Ticonic Nat. Bank, *supra;* United States v. Equitable Trust Co., 283 U. S. 738, 51 S. Ct. 639, 75 L. Ed. 1379; City of Wewoka v. Banker, 10 Cir., 117 F. 2d 839; O'Hara v. Oakland County, 6 Cir., 136 F. 2d 152; Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157; Wallace v. Fiske, 8 Cir., 80 F. 2d 897; In re Middle West Utilities Co., D. C., 17 F. Supp. 359; Clarke v. Hotsprings Electric Light & Power Co., 10 Cir., 76 F. 2d 918; Security National Bank of Watertown v. Young, 8 Cir., 55 F. 2d 616, 84 A. L. R. 100; Nolte v. Hudson Navigation Co., 2 Cir., 47 F. 2d 166; Central Railroad & Banking Co. of Georgia v. Pettus, 113 U. S. 116, 5 S. Ct. 387, 28 L. Ed. 915. In United States v. Equitable Trust Co., *supra,* the rule was recognized and applied in a suit involving this Estate, and the appellees rely upon it to support not only the application of the equitable rule, but to sustain the jurisdiction of the court over the fund from which the costs are to be paid."

Time and space forbid more extensive quotation from the opinion, but it is commended to the close scrutiny of this Court. The effect of the decision was to subject the restricted funds of Barnett's heirs, in the custody and control of the Secretary of the Interior as their guardian or trustee, to the allowance and payment of attorneys' fees and expenses.

In the subsequent case of *Anglin & Stevenson v. United States,* 160 F. 2d 670, the attorneys claimed they should have interest on the amounts of their fees and expenses. The Court denied them interest. In its opinion the Court referred to the former proceeding and said in respect thereto, at page 673:

> "We recognized the restricted character of the funds and that the Secretary held the same as guardian of his Indian wards in a sovereign capacity. United States v. Anglin & Stevenson, *supra,* 145 F. 2d at page 628. We held, however, that equitable jurisdiction to determine heirship and settle the estate carried with it as a necessary incident the power to award reasonable attorney fees and expenses to the attorneys for the successful heirs. In so holding, we pointed out that when the court acquired jurisdiction over the subject matter on petition of the United States under Section 3 of the Act of April 12, 1926, 44 Stat. 240, it was thus empowered to hear and determine all matters involved in the suit and enter a judgment binding upon the United States 'to the same extent as though no Indian lands were involved.' See also Caesar v. Burgess, 10 Cir., 103 F. 2d 503. *And that the Government having thus expressly given its consent to be bound by the judgment, it could not stop the equitable processes short of final adjudica-*

tion—that the determination of the heirship and the award of attorneys fees was one continuous litigatory process." (Italics ours.)

In the italicized portion of the matter last above quoted is found the complete answer to the Government's contention here made, namely, that since Section 345 of Title 25 U. S. C. A. does not in express words authorize allowance of fees none can be awarded. It is not necessary to expressly provide for such allowance; the power to allow fees inheres where jurisdiction is present.

The United States, by reason of Section 345, *supra,* consented to be sued in equity by any Indian who claims to be entitled to an allotment of lands in severalty. It thus consented to be bound by any decree pronounced by such court in the exercise of its historic equity jurisdiction,

> "And . . . having thus expressly given its consent to be bound by the judgment, it could not stop the equitable processes short of final adjudication—that the determination of heirship and the award of attorneys' fees was one continuous litigation." (160 F. 2d 673.)

This is but another way of saying that when Congress confers jurisdiction upon the District Court, that Court may then and thereunder exercise all of "the judicial power of the United States." (Constitution of United States, Art. III, Section 1.) "Judicial power" is said to be "that power vested in courts to enable them to administer justice according to law." (*Adkins v. Childrens' Hospital,* 261 U. S. 525, 544.) That power, as distinguished from jurisdiction, derives from the Constitution itself, and in equity suits embraces the rules and principles laid down by English Courts of Chancery. Having granted the neces-

sary jurisdiction, the Government may not thereafter confine and limit the judicial power incident thereto within a narrow legalistic straight-jacket, as it is attempting to do here. Or, as stated, *supra,* "it could not stop the equitable processes short of final adjudication," including award of attorneys' fees.

(D) The Authorities Cited by the United States Are Not Applicable in This Proceeding.

The Government's argument is based upon a narrow construction of Section 345 of Title 25 U. S. C. A. Moreover, it is erroneous.

The basic weakness of the Government's position is that it fails to take into account the fact that the suit authorized by Section 345 is equitable, and that principles of equity are to be applied in such a suit. When so considered, it is manifest that by its consent to be sued it likewise consented that the historic equitable jurisdiction and power of the District Court should be exercised to the fullest extent necessary "to administer justice according to law," that is, to do equity between all persons involved in the suit.

The decisions cited in the Government's brief do not extend to the situation presented by this appeal. It may be conceded that the United States is interested in the allotted lands, *but only as a trustee for Arenas.* It was also interested, as such a trustee, in the funds and estate of Jackson Barnett, but that fact was held insufficient to prevent allowance and payment of attorneys' fees and expenses out of the restricted, or trust, property of the Indian.

The assertion of the United States, that this Court's former decision (*United States v. Arenas,* 158 F. 2d 730)

conflicts with the District Court's decision in this fee proceeding, is erroneous. The excerpt quoted is torn from its context, and does not have the meaning attributed to it. There the Government urged that, by the reservation in the decree in respect to future hearing in respect to fees, "a judgment would be entered against the United States for such expenses," and it further urged that Section 345 of Title 25 U. S. C. A., "by which the United States consented to this suit, does not authorize the imposition of liability for costs or other expenses of litigation against the Government." (158 F. 2d 753.) This Court said in respect to the contentions made:

> "We agree entirely with the appellant's construction of the Act of 1894 (25 U. S. C. A. Section 345). The difficulty with the appellant's argument, however, is that it has no application to the case at bar.
>
> "The judgment of the court below seeks to impose no liability for any expenses of litigation upon any one, certainly not the United States. The appellant does not question the court's right to leave the case open for such future action as it may deem proper: the objection is that 'presumably' the lower court is planning to mulct the Government for the appellee's attorneys' fees.
>
> "There is neither internal nor external evidence that the judgment reflects any such intention, or any other unlawful or unfair intention. So far as the appellant is concerned, any objection to this paragraph of the judgment is not only premature, but moot. For this reason, this Court refrains from making any ruling on the subject." (*Id.* p. 753.)

The Government's assertion of inconsistency or conflict is thus shown to be wholly unfounded.

II.

The District Court in the Exercise of Its Equity Jurisdiction, Has Power to Impress a Lien Upon the Lands Allotted to Arenas to Secure the Payment of Attorneys' Fees and Expenses of Suit.

In its judgment, the District Court adjudged and decreed:

> "That the payment . . . (of fees and expenses) for the use and benefit of said plaintiff, be and the same is hereby secured by an equitable lien upon the allotments . . . and upon all rights conferred by said allotments, and upon the entire interest and estate of Lee Arenas and his heirs in the lands embraced within said allotment . . ." [R. p. 52.]

This lien is a charging lien upon the property secured for Arenas by the labor and skill of appellees. It is in its nature a special equitable lien which arises out of the right of an attorney to look to the judgment or recovery obtained through his skill and labor for his reasonable fees.

> *Webster v. Sweat* (5 Cir.), 65 F. 2d 109;
>
> *In re McCormick's Estate,* 14 N. J. Misc. 73, 183 Atl. 485;
>
> *In re Abruzzo's Estate,* 249 N. Y. Supp. 72, 139 Misc 559;
>
> *Bloom v. Morgan,* 163 Fed. 395, 397.

In 7 Corp. Jur. Secundum 1142, it is said:

> "The lien is based on the natural equity that plaintiff should not be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment."

Supporting the text quoted, see *Graeber v. McMullin,* 56 F. 2d 497 (10 Cir.), cert. denied 287 U. S. 603; *In re Wilson,* 12 Fed. 235; *Platt v. Jerome,* 19 How. 384, 15 L. Ed. 623; *In re Gillespie,* 190 Fed. 88; and many state cases decided by the Courts of Alabama, Colorado, Georgia, Illinois, Indiana, Maine, Michigan, Montana, Nebraska and New York. (See notes 80 and 81, 61 Corpus Juris, pp. 766-767; and note 78, 7 Corpus Juris Secundum, p. 1142, where the cases are collected.)

The principle stated, supra, has the express approval of the Supreme Court of the United States. In *Louisville, E. & St. R. R. Co. v. Wilson,* 138 U. S. 507, already cited, the Supreme Court said:

> "We think it may fairly be held that a party who takes the benefit of such a service ought to pay for it, and that equity may properly decree payment therefor. As justly remarked by Lord Kengor in Read v. Dupper, 6 Term R. 361, 'the principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained.' In Renick v. Judington, 16 W. Va. 378, 392, it is said: 'The lien (even in cases of *quantum meruit*) is in the nature of an equitable lien (*Vanleet v. Vanleet,* 3 Coop. (Tenn.) Page 23), and is based on the natural equity that the plaintiff ought not to be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment.' See, also, *Mahone v. Southern Tel. Co.* (C. C.) 33 F. 702, and In re Pascal, 10 Wall. 483 (19 R. Ed. 992)."

In addition to the foregoing authorities, the Supreme Court has held, expressly or by necessary implication, that such a lien may be impressed upon the property recovered for an Indian although it is restricted.

> *United States v. Equitable Trust Co.,* 283 U. S. 738, 744;
>
> *United States v. Anglin & Stevenson,* 145 F. 2d 622, 629.

In the *Equitable Trust* case, the Supreme Court said (283 U. S. 744):

> "It is a general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention *may be charged* with the costs and expenses, including reasonable attorney's fees, incurred in that behalf; and this rule is deemed especially applicable" (as to the property recovered for the incompetent Indian Barnett). (Italics ours.)

To the same effect: *United States v. Anglin & Stevenson,* 145 F. 2d 622, at page 629. See also, *Texas v. White,* 10 Wall. 483, 19 L. Ed. 992, where the principle was approved as against a sovereign State.

In *Mahone v. Southern Tel. Co.,* 33 Fed. 702, at page 705, the Court said:

> "The lien of an attorney upon the fund he represents in court, as against his own clients, is so well established . . . that no hardship can be presumed to result, or ought to result, from the enforcement of it by the Courts."

Finally, we think this Court has already decided the question under discussion in accordance with the argument here made. On the 15th day of December, 1948, this Court approved a stipulation between Lee Arenas and John J. Taheny, Esq., his counsel of record in opposition to the allowance of attorneys' fees to appellees, allowing Mr. Taheny fees in the amount of $4,550.00 and expenses in the amount of $410.98, and by its order this Court impressed a lien upon all of the interest of Lee Arenas in the lands obtained for him in this suit, through the labor and skill of appellees, to secure the payment of said fees and expenses. [R. pp. 205-207.]

It seems clear that, if Mr. Taheny is entitled to a charging lien for services that in no way contributed to securing or preserving the lands in question, then surely more impelling equities require that appellees be allowed their fees and expenses of suit and that they be given a lien to secure the payment thereof upon the property they obtained for Arenas.

We believe the Court was fully justified in awarding fees to Mr. Taheny and in impressing a lien upon the allotted lands to secure the payment thereof. We believe that for similar but also for far more persuasive and impelling reasons the District Court had power to allow fees to appellees and to impress a lien upon the lands of Arenas to secure payment thereof.

III.

The District Court, in the Exercise of Its Equity Jurisdiction, Has Power to Order a Sale of the Property Allotted to Lee Arenas, or Such Portion Thereof as May Be Necessary, to Pay and Satisfy the Lien and Judgment Awarded to Appellees.

Since the District Court has jurisdiction and power to allow attorneys' fees in this suit in equity and to impress a lien upon the property recovered for Lee Arenas, it logically follows that said Court has power to enforce its decree by a sale of said property, or so much thereof as may be necessary. This logical conclusion is supported by the great weight of authority.

The rule is generally stated in 33 Am. Jur. 441 as follows:

> "It is settled beyond question that a court of equity is the appropriate tribunal for the enforcement of an equitable, as distinguished from a statutory or common-law, lien. Moreover, since equity has brought into existence liens unknown to the common law, it can enforce them by whatever means they will be rendered more efficacious in doing justice to the parties interested. A court of chancery may enforce an equitable lien on either an equitable or legal estate in lands, and if the law creates a lien upon a legal interest in realty, a similar lien may sometimes be declared and enforced in chancery upon equitable estates by analogy. . . . Lands, but not claims to lands, may be sold by a court of equity to discharge liens."

In 37 Corpus Juris 308 there appears a valuable statement of the rule in question, as follows:

> "The term 'lien' is used in equity in a broader sense than at law. And although it is difficult to define ac-

curately the term 'equitable lien', generally speaking, an equitable lien is a right, not recognized by law, and which a court of equity recognizes and enforces as distinct from strictly legal rights, to have a fund or specific property, or the proceeds, applied in full or in part to the payment of a particular debt or demand; a right of a special nature over property which constitutes a charge or encumbrance so that the property itself may be proceeded against in an equitable action, and either sold or sequestered, and its proceeds or its rents and profits applied on the debt or demand of the person in whose favor the lien exists. . . ."

It is further stated in the same text, at page 340:

"Except where there is a full and complete remedy at law, a court of equity has general jurisdiction to enforce liens, and in the absence of statute, *will foreclose them in obedience to the well settled rules of equity jurisprudence.* An equitable lien of course may be enforced in a court of equity, which in fact is the only proper tribunal for enforcing such a lien, regardless of what rights the lienor may have in a court of law. The usual mode of enforcing an equitable lien is by a decree for the sale of the property to which it is attached, and for the application of the proceeds to the payment of the debt secured by it, and such a lien will generally be enforced against all those holding an interest in the property to which it attaches."

Numerous federal cases are cited by the authors in support of the text. See,

Peck v. Jenness, 7 How. 612, 12 L. Ed. 841;

Vidal v. S. American Sec. Co., 276 Fed. 855;

Hotchkiss v. Nat'l City Bank, 200 Fed. 287, 291 (aff. 201 Fed. 664, 231 U. S. 50);

In re Nat'l Cash Register Co., 174 Fed. 579;
In re Maher, 169 Fed. 997;
In re Byrne, 97 Fed. 762;
Shakers Soc. v. Watson, 68 Fed. 730;
The Menominie, 36 Fed. 197;
Burdon etc. Co. v. Ferris Sugar Co., 78 Fed. 417;
King v. Thompson, 9 Pet. 204, 9 L. Ed. 102;
Riddle v. Hudgins, 58 Fed. 490.

The rule, as above stated, is recognized by the California decisions. These are summarized in 16 Cal. Jur. 353, as follows:

> "It is a recognized function of courts of equity to enforce liens, whether equitable or statutory, and whether created by law, or by express contract between the parties."

The authors cite many California cases in footnotes 17, 18, 19 (*id.* p. 353).

Pertinent here is the statement found in *Holbrook v. Phelan,* 121 Cal. App. 781:

> "The enforcement of liens is a well-recognized function of courts of equity. (Hibernia etc. Soc. v. London etc. Ins. Co., 138 Cal. 257 (71 Pac. 334); Kreling v. Kreling, 118 Cal. 413, 419 (50 Pac. 546).) The test of the jurisdiction of a court is ordinarily to be found in the nature of the case, as made by the complaint, and the relief sought. (Becker v. Superior Court, 151 Cal. 313, 316 (90 Pac. 689).)"

(A) To Follow the Position of the United States Would Do the Indians Claiming Allotments a Distinct Disservice.

It has been clearly established, *ante,* that a court of equity has power to require Arenas to pay his debt to appellees from the estate in the allotment secured for him by appellees by impressing an equitable lien thereon. This Court has already given such a lien in favor of an attorney who came into the case to contest the claims and rights of appellees. [R. pp. 205-207.]

If the allotments to Arenas are to be sold to satisfy these liens, then it is better that an unclouded title, rather than a restricted one, be given to the purchaser. This is so because more of his estate in the allotments will be required if the purchaser takes a clouded title.

It is thus obvious that the net result of the position taken by the Government, if followed to a final conclusion, is to do its Indian ward a distinct disservice.

Conclusion.

For the foregoing reasons, the judgment of the District Court should, in all respects, be affirmed.

Respectfully submitted,

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